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SUPREME COURT. U. S.

No. 833

In the
United States Court of Appeals
For the Seventh Circuit

No. 11972

UNITED STATES OF AMERICA, ex rel. ANGELO ANTONIO CANTISANI,
Petitioner-Appellant,
vs.
R. J. HOLTON, District Director of Immigration and Naturalization Service of Chicago,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable Philip L. Sullivan, District Judge.

SUPPLEMENTAL APPENDIX.

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SUPPLEMENTAL APPENDIX.

1

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 C 300) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before Honorable J. Sam Perry, one of the Judges of said Court, in his courtroom in the United States Court House, Chicago, Illinois, on Friday, February 25, 1955, 10:00 o'clock A. M.

Present:

Mr. P. D. Maktos,
appeared on behalf of Petitioner;

Hon. Robert Tieken, United States Attorney,
By: Mr. Leon A. Kupeck,
Assistant United States Attorney,

and

Mr. Irving I. Freedman,
Attorney for the Immigration and
Naturalization Service in Chicago, Illinois,
appeared on behalf of Respondent.

2 By the Clerk: This is Judge Knoch's case.

The Court: That is all right.

The Clerk: 55 C 300. Angelo Antonio Cantisani *v.* Holton, District Director of Immigration.

The Court: What is the nature of this motion?

Mr. Maktos: This is a complaint for a restraining order.

On March 31, 1953, the petitioner sued for a writ of habeas corpus on April 1, 1953. The case was No. 53 C 727. That case was one seeking bail and other relief. Subsequently the petition was dismissed. Petitioner was then

remanded back to the custody of the Immigration Service. Subsequent to the dismissal of the original petition for writ of habeas corpus petitioner was released on bail for the sum of $1,000 pursuant to a special act of Congress, and remains at liberty until this day.

The petitioner is now under warrant of arrest for deportation charging him, inter alia, with unlawful entry. Since the petitioner's entry into the United States he has been a law-abiding citizen and a person of good moral character, and is desirous of applying for voluntary departure from the United States, and pursuant to such desire for voluntary departure he through his counsel has sought to arrange for designated country of acceptance of entry of his choice.

The Court: Will he pay for it himself?

Mr. Maktos: Yes, he will, your Honor.

The Court: All right. Is there opposition to this?

Mr. Kupeck: Very much so, your Honor.

The Court: All right.

Mr. Maktos: But such requested—

The Court: Is it going to be any length of time?

Mr. Kupeck: It will be a lengthy argument, your Honor.

The Court: All right. I will ask you gentlemen to come back at 2:00 o'clock.

Mr. Maktos: Your Honor, if I may, with all due respect to the Court, the Immigration authorities have asked that this man report on a legal holiday, which is February 27. I have been in this case only since Friday of last week, and—

The Court: Well, if you will come back at 2:00 o'clock I will be glad to hear you.

Mr. Maktos: Your Honor, again if you please, I don't want to be insistent, but the time would not be available to my client in the event that your Honor would dismiss this complaint. I would like to take an appeal on it.

The Court: Well, at 2:00 o'clock today, is there any difference between now and 2:00 o'clock today?

Mr. Maktos: Then I presume that your Honor wants me to prepare papers in anticipation of something which I think is a valid motion.

The Court: I don't know. I haven't time to go into it now. I am merely asking you to wait until 2:00 o'clock, because I have got a large number of lawyers on set cases that are being called this morning. I can't take the time for a lengthy argument. If you will come back at 2:00 o'clock I will be glad to hear it.

Mr. Maktos: Would your Honor entertain asking the Department to give us a stay of deportation until Monday, and I would like to come in and try it then, sir.

The Court: Well, I will hear the whole matter and consider whether I will give you that stay at 2:00 o'clock.

Mr. Maktos: Thanks very much.

The Court: At 2:00 o'clock I will be glad to, unless you are tied up in some court or something.

Mr. Kupeck: I will be here.

Mr. Maktos: I will be here, sir.

The Court: All right. Then we'll decide it.

2:00 o'clock P. M.

By the Clerk: 55 C 300, Cantisani *v.* Holton. Motion for restraining order against Holton.

The Court: This is Judge Knoch's case.

Will you bear with me, gentlemen, while I look at this file and see what the complaint claims, and so on.

You may proceed. I will not of course attempt to dispose of the matter fully because under our rules, except in emergency matters, I would not have jurisdiction to enter a final order at this time in my opinion. So go ahead. You may proceed.

Mr. Maktos: Your Honor, without taking too much of the Court's time I would like to point out that, to expedite your decision, the only question in my mind that is raised here is under Section 243(a) of Public Law 414, Chapter 477, Title 8, Section 253, where petitioner agrees that he is entitled to designate the place to which he is to be
6 deported and be accorded due process of law.

Counsel appeared before the Deputy Commissioner and the officer in charge of deportation, and asked them if they would allow me to file, and I was denied that right. It is a discretionary right if it is filed in the Immigration Service.

I then asked them if they would allow me to surrender my client on Friday so that I might file a writ of habeas corpus, and that was denied me. They have my client appearing on a legal holiday, February 27, 1955, which falls on a Sunday, and the Department is well aware of the fact that I have no recourse, that I cannot possibly file a writ of habeas corpus on Sunday. The Department is well aware of that. I asked them if they would give me a stay of deportation until I would effect travel documents and set a particular time under which I would have to accomplish this. This was also denied me. Any right I have asked for my client and in behalf of my client has indiscriminately been disallowed, and that actually, your Honor, is the basis for the complaint.

I also apprised the Deputy Commissioner that I had this action and was ready to file, and that I thought we
7 were taking up the Court's time since it lies within his discretion to allow it. However, he told me that it had run the full gamut, that I was at liberty to do as I chose.

Mr. Kupeck: May it please the Court, at the outset counsel is requesting the Court to do something which the Court is I suggest without jurisdiction. There is a

prayer in the complaint in the motion to restrain an officer of the United States in the performance of his official functions. The Court is without jurisdiction to do so because to do so is in reality an action against the United States in a matter in which it has not consented to be sued.

As to this case, your Honor, there was a designation by the plaintiff alien before the hearing officer of the Immigration Service, and I have before me a certified copy of the record before the Immigration Service where the question was asked him:

> "Under the law you may designate the country to which your deportation is to be directed in event you are ordered deported in accordance with law. Therefore, you are asked to state the name of such country."
>
> "To Italy."

The passport has been obtained, the tickets have been obtained on a plane and on a boat, and everything has
8 been done in compliance with law and statute. He did not exhaust his administrative remedies at that time.

On April 1, 1953 a petition for writ of habeas corpus not going to the legality of the deportation order, but merely as to his right to bail, was denied. Nothing further has been done by the petitioner alien until yesterday, day before yesterday when there was service of notice of motion for leave to amend petitioner's writ of habeas corpus which was denied or held moot by Judge Igoe yesterday morning. Then yesterday afternoon we were served with this motion.

I submit to the Court that—

The Court: Wait a minute. What was held moot by Judge Igoe?

Mr. Kupeck: This motion for leave to amend the petition. He said that case was over.

The Court: Do you mean the original case?

Mr. Kupeck: That is right, that was over. So counsel filed yesterday his complaint for restraining order and served us with notice.

The Court: Don't you think Judge Igoe is absolutely right, that that case is terminated a long time ago?

Mr. Kupeck: That is right.

9 The Court: I don't think there is any question about it.

Mr. Kupeck : That is right. Furthermore, your Honor, the statute and the cases are to the effect that the indispensable parties have not been joined in this action. Indispensable parties to this action are the Commissioner of Immigration and/or the Attorney General of the United States, because the law is clear, I submit to the Court, that before any action can be taken by the District Director, his subordinate,—it is in reality an action directly against the Commissioner of Immigration or the Attorney General, who have to be served personally in Washington, and the law is, as your Honor is well aware, that a district court outside of the District of Columbia has no jurisdiction over the Attorney General or the Department of Immigration.

The Court: Well, is the Government complaining that they have not made necessary parties whom they can't make, whom they can't get jurisdiction over?

Mr. Kupeck: The Government maintains that this Court has no jurisdiction because of failure to join them as indispensable parties under the statute.

The Court: You can't join them, and you can't make them parties because they are not here. That would be

10 a useless gesture, wouldn't it?

Mr. Kupeck: Your Honor, I can't quarrel with the law as I find it. I have the law and the authorities, and I have to cite the decisions as I find them.

The Court: Let me ask this simple question. Is it the custom to direct people to appear on a holiday?

Mr. Maktos: Your Honor, I have a very limited—

The Court: I am asking the Government. Is it the custom to have men appear on a holiday?

Mr. Freedman: Your Honor, the only reason they are called in for Sunday is because the boat leaves on Monday morning, and—

The Court: Why didn't they call him for Saturday then?

Mr. Freedman: I don't know why they didn't call him for Saturday, but Sunday apparently is the most appropriate day to call them in. Otherwise we would have to keep them in custody over Saturday and Sunday. This way we have them on Sunday, and we transfer them to New York and they go directly to the boat. Otherwise we would have to keep them in custody in New York.

The Court: Go ahead, counsel for the Government. Is there anything else?

Mr. Kupeck: Yes. And counsel having filed a mo-
11 tion for restraining order, your Honor, he comes within the province of law of injunctions. Here we might argue that the doctrine of laches might be held to apply in that since April 1953 nothing was done. Furthermore, the petitioner alien has not been in before this Court with so-called clean hands. May I be more specific, your Honor?

In the complaint for restraining order, which is sworn to, your Honor, by the petitioner alien, he states, for example, in paragraph 4 on page 2 that through his counsel he sought to arrange for a designated country of acceptance and entry of his choice, but such request to designate a country was arbitrarily denied.

The record is to the contrary. As I read to your Honor from the official transcript he was asked to designate his country; he so did.

In paragraph 5 he states that petitioner unlawfully entered the United States as a stowaway, having fled for his life from the alien country of Italy. This is not so. He was smuggled in, for which he paid 8,000 lira, which is the equivalent of about a thousand dollars. I beg your pardon. 800,000 lira, your Honor.

And according to the record, your Honor, he made
12 a statement—

The Court: How much is that in dollars and cents?

Mr. Kupeck: About $800.

The Court: As I remember it, the lira was quite inflated.

Mr. Kupeck: He was not fleeing for his life, but he was smuggled in. He states himself that when he was asked, and the report so shows, he was asked when approached by the leader of this band of smugglers whether he wanted to come to the United States and at first he said no, and then he was persuaded to come to America. That is an untrue statement which he has in his petition, and to which he has sworn.

Further, in paragraph 6—

The Court: Well, the fact that he was smuggled would not necessarily mean that he was not fleeing for his life. It would not necessarily mean it. He could have gotten smuggled in here and paid to get here. A fellow will pay all he has to get away from a dangerous situation, wouldn't he? That is not entirely inconsistent. However, I am not quarreling with you on that.

Mr. Kupeck: Be that as it may, your Honor, he at first denied it. In paragraph 6 he says he would be
13 putting himself in unquestionable jeopardy if he returned to Italy. Before the hearing officer he designated Italy as the country to which he wanted to be returned. Apparently he still is persona grata there, because a passport was obtained from the Italian Consul. He is acceptable to Italy.

The Court: Of course, a lot of things have happened in Italy in the last year, since he might have designated that. There has been quite a communistic trend there, has there not?

Mr. Kupeck: Well, your Honor, therefore—

The Court: I don't know.

Mr. Kupeck: May I meet that point, your Honor? He has not exhausted his administrative remedies. He could have a hearing under Paragraph 243(h)—

Mr. Maktos: I object, your Honor, to that.

Mr. Kupeck: May I complete my argument?

The Court: Let me hear him.

Mr. Kupeck: He could have had a hearing under Paragraph 243 (h) of the Immigration and Nationality Act of 1952 as to the so-called physical persecution, of which we had no awareness. He could have had his hearing. I mean that is provided by regulation under Section 243(h). This was not applied for at any time.

The Court: Did he have an attorney during that 14 time?

Mr. Kupeck: He has been represented by beaucoup counsel. Ab initio he has had counsel in this case, different counsel, all competent counsel.

The Court: Counsel, what do you say with respect to the comments of the Government?

Mr. Maktos: Your Honor, I do not wish in any way to question all of what counsel has said. However, I think at the outset I stipulated that I did not come into this case until Friday. The files in this case are very scattered. However, I did go through the Immigration authorities in order to get a picture of this particular case. I understand that counsel states that these questions were asked. I would merely like to know whether there was an interpreter at the proceedings, for one reason, that in order to make any sense out of my client at all, I have to talk

through an interpreter because he can't possibly understand me.

Counsel further alleges—

The Court: Well, let's find out. Does the record reveal whether there was an interpreter at the time?

Mr. Kupeck: There was at all times, your Honor. The record so shows, at all times.

Mr. Maktos: Fine: That is a question I would like
15 to understand.

Was the country designated at that particular time —was Italy—that could have been, and I don't say that it was—he states that we came in here with unclean hands. I think that is jumping to a conclusion.

The Court: This is not an equity matter.

Mr. Maktos: I can appreciate that. However, this is the very heart of what my pleadings are, your Honor. They stipulate that he was never in any way bothered by the communists. I don't think they have anything to show that that is true. They stipulate that he is not in jeopardy of his life. I don't see anything that proves that that is untrue.

I think the allegation that we are coming into court with unclean hands is certainly an unfair one, because under the administrative powers of the Immigration Service they could have put this off. I requested that I bring the man into custody on Friday. There is certainly evidence of the fact that I wouldn't make the statement in open court to that effect.

I was also told that no matter what I filed in the Immigration Service that this has run its gamut and that
16 they were going to merely throw him out of the country.

I beg your Honor, here is a man who wishes to have voluntary departure, he wishes to have a time in which to designate a country. I don't think they should go into in-

finitum or twenty years; I think that under the law he is allowed ninety days in which to do that. Then in the discretion of the Attorney General, if he then believes that the country to which he has designated will not allow him in or that for other reasons he cannot under the law, had the right to proceed and deport. But the petitioner in this matter does have a right to designate. Whether or not he paid $1500—I think your Honor knows that a man who comes to the best country in the world would pay everything he had, and he certainly does not travel for free. I don't know that our transportation problems here are being questioned. I would think the fact that he did pay $1500 is a credit to an alien to want to get here.

Mr. Kupeck: Your Honor, may I read from Section 243(a) of Public Law 414?

> "No alien shall be permitted to make more than one such designation."

That is, he can only designate one country. He is barred under the law from making a further designation. Even if the Attorney General wanted to permit him to make another designation the statute says he cannot make more than one such designation. He has made that designation.

Mr. Maktos: Again, your Honor, I object. The designation is made by writing, your Honor, and not merely taken up with a hearing officer. I am sure counsel is aware of that, that we are trying to take this particular case—

The Court: Has there ever been a written designation?

Mr. Maktos: There has never been a written designation. I asked to make a written designation on Friday and was told that we could not do it, they would not honor it. That is what my complaint is with the Department today, not that he should not be deported, but his rights to the twelfth hour—

The Court: Let us find out if there has been a designation in conformity with the regulation.

Mr. Kupeck: There has been a designation in conformity with the regulations, and the written record so states, your Honor, certified.

The Court: That is,—

Mr. Kupeck: Of the hearing. This is a certified record, your Honor.

18 The Court: This is a statement of the hearing—

Mr. Kupeck: That is right.

The Court:—but isn't there a written document—

Mr. Kupeck: There is no requirement in the statute that it be done in any other particular way.

Mr. Freedman: Designations are made at the hearing according to regulations before the hearing officer.

Mr. Kupeck: At the hearing, that is the way they are made, in compliance with the regulation under the statute.

Mr. Freedman: The hearing officer is required to advise the respondent that he has the right to make such designation, and he has to make that designation then.

Mr. Maktos: Your Honor, a copy of this hearing has never been sent to counsel. The law also provides that that must be done on request. I think that we are actually—

The Court: Did you request it?

Mr. Maktos : I have not been in the case.

The Court: You don't know whether the other counsel—

Mr. Maktos: It has never been—your Honor, the

19 record has never been sent to the other counsel.

The Court: Do you know whether other counsel requested it or not?

Mr. Maktos: I understand from Mr. Green who was the original attorney in this case that a request for it had not been received by him, but that it was requested by Dolan at the time that the bill was put in to Congress. As to whether or not these facts are accurate, I beg the Court

to consider it somewhat dubiously, since I have had no personal record. However, I think we are still getting off on tangents, your Honor, and much trivia, and which involves a man's life. In actually sending him to Italy where he is in fear of his life and I have a signed statement to that effect, your Honor, and on its face it is accepted.

We are going here purely on a procedural, administrative right, in which discretion lies not only with the Commissioner, not with the Deputy Commissioner, but even down to the point of the deportation officer, who specifically stated, "Bring me two steamship tickets in here and we will let you have until April." This was on Monday.

How can I possibly do anything in that length of time?

I said, "Look, let me have X amount of time in order to obtain the proper tickets."

Going out and buying two steamship tickets to any place, or one, is no particular problem. I am arguing the fact that we have been denied any process in the Immigration Service. I am not asking that this Court give me ten years, your Honor. All I am asking for is a three-month period within the statute in order to designate. Merely because there has been a denial at the hearing—there are many things that have been denied in hearings. An alien certainly does not know his rights. Counsel representing an alien could conceivably make a mistake. At that particular time they knew that there would be a bill introduced. I think it is just a question of hitting the fringes of law. I don't think we are at the meat of the situation.

The Court: Wait a minute. Explain that statement there. Do you mean at that time, they knew what, that there would be a bill?

Mr. Maktos: This man was incarcerated under a warrant.

The Court: Yes.

Mr. Maktos: They asked for bail, and that was the writ of habeas corpus that went before Judge Igoe.

21 That was denied.

Mr. Kupeck: That is right.

Mr. Maktos: Then a special bill was introduced in which $1,000 bail was then—

Mr. Kupeck: This is incorrect. The special bill—

The Court: That is what is confusing.

Mr. Kupeck: That is incorrect. The special bill didn't even get through the Judiciary Committee. It was rejected. Counsel is confused.

May I explain it, your Honor? The petitioner alien was denied bail by the Immigration authorities. He came in on writ of habeas corpus, which was denied. Then a private bill was introduced permitting him to stay in this country, and be accepted as an outboard immigrant. That had nothing to do with the bail. The Immigration Service later released him on bail, but that had nothing to do with the writ of habeas corpus.

The Court: I don't see how a bill could have anything to do—

Mr. Kupeck: It did not, your Honor.

The Court: Unless it passed, how could it have anything to do—

Mr. Kupeck: None whatever.

Mr. Maktos: It has no effect.

22 The Court: That is what I thought.

Mr. Maktos: But by the admission of counsel himself he said that the Department of Immigration would not issue it. There was a bill introduced, your Honor.

Mr. Kupeck: I may answer that. It is a matter of courtesy accorded to Congress if there is a matter pro-

ceeding before them that they will leave the man out on bail instead of keeping him detained, since he has invoked the power of the United States Congress. He was permitted to go on bail.

The Court: I think it is very advisable. I served a term in the Legislature, and it is very advisable for them to pay some due respect to the Congressman who introduced the bill.

Mr. Kupeck: May I return, your Honor—

The Court: All right, go ahead.

Mr. Kupeck: —to the matter of whether counsel requested a copy.

I have a question here asked before the hearing officer:

"Does counsel wish to be furnished with a written copy of the decision?"

"No."

The Court: Counsel has stated that he was not
23 too familiar, he hadn't seen—

Mr. Maktos: I think it has been intimated to the Court that that is what Mr. Green stated. I understand after that Thomas Dolan was also counsel in the case?

Mr. Kupeck: But the man who appeared before the hearing officer stated that he did not want a copy. Anyway, that is immaterial.

Mr. Maktos: Well, it is not immaterial at all.

Mr. Kupeck: I submit that even if the Attorney General had the power—of course, the Attorney General is not here as a party to these proceedings and, as I said before, the Court is without jurisdiction in the premises—under the statute the alien can only make one designation. The statute so provides.

Mr. Maktos: I contend, your Honor, that that was not a designation.

Mr. Kupeck: It is a designation made in compliance with the statute and the regulations thereunder. If that

outlines the procedure for making the designation, how else can you do it?

The Court: Gentlemen, I can only pass upon the emergency matter. This case is assigned to Judge Knoch, and it comes here on an emergency motion angle.

24 There will be a temporary restraining order granted and the case will be set down before Judge Knoch for final determination on March 4. I can't say that he will determine the matter on that day, but it will be continued until that day, and I will not attempt to enter any permanent restraining order because I haven't the jurisdiction I think to do it. A temporary restraining order, and the matter is continued before Judge Knoch, and on that day the petitioner should appear with his counsel before Judge Knoch so there can be no question, if he should be surrendered, what Judge Knoch decides at that time—this is his case, and he may call for the law that day, he may want to hear it and finish it that day. He is going to be back here at that time, but my order is a temporary order.

Mr. Kupeck: What is the bond? Will your Honor set bond on the petitioner, under the rules?

The Court: He has $1,000 bond now, doesn't he?

Mr. Maktos: Yes, he does.

The Court: $1,000 bond will be sufficient, and to be returnable on the 4th at 10:00 A. M.

Of course, the Judge may want to continue it further, but that will be the order of the Court at the present

25 time.

Mr. Maktos: Thank you.

The Court: You had better prepare a written order on that.

Mr. Maktos: Yes. I have it ready, sir.

The Court: Where it is represented in the petition I would want to give a full hearing, but I am not in a posi-

tion to give a full hearing. It is not my case. That is up to Judge Knoch to give the full hearing.

My viewpoint is that America is still an asylum for those who may be persecuted.

Mr. Maktos: Thank you very kindly, your Honor.

26

IN THE UNITED STATES DISTRICT COURT

* * (Caption—Civil Action No. 55 C 300) * *

I, Edward Newlander, do hereby certify that I reported the proceedings had in the above-entitled cause before Honorable J. Sam Perry, one of the Judges of said Court, on Friday, February 25, 1955; and that the foregoing is a full, true and accurate transcript of said proceedings.

Edward Newlander
Official Court Reporter
United States District Court
Northern District of Illinois

February 28, 1955.

27

IN THE UNITED STATES DISTRICT COURT

* * (Caption—Civil Action No. 55 C 300) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before Honorable J. Sam Perry, one of the Judges of said Court, in his court room in the United States Court House, Chicago, Illinois, on March 3 and 4, 1955.

Present:

Mr. P. D. Maktos,
appeared on behalf of petitioner;

Hon. Robert Tieken,
United States Attorney, by
Mr. Leon A. Kupeck,
Assistant United States Attorney,
and
Mr. Irving K. Freedman,
Attorney for the Immigration and
Naturalization Service in Chicago, Illinois,
appeared on behalf of respondent.

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28 By the Clerk: 55 C 300, Cantisani *v.* Holton. Motion Government to vacate order and to enter an order nunc pro tunc.

Mr. Kupeck: If your Honor will recall, this matter was up last Friday and your Honor entered an order, the gist of which was to restrain the District Director of Immigration and Naturalization, and since this matter was heretofore assigned to Judge Knoch, to set it before Judge Knoch; and counsel for complainant alien prepared an order which he did not submit to me, and the order we maintain does not correctly reflect what the court said.

We have prepared and submitted to your Honor in the new short form what we thought was the order that the court entered.

Mr. Maktos: If your Honor please, at the outset, counsel was well aware of the fact that my complaint for injunction was filed in this court, and on pages 23, 24 and 25 of the transcript, I think your Honor stated he would not entertain a complaint for injunction but that he would enter a restraining order pending a hearing be-

fore Judge Knoch, and I am quite sure that counsel is aware of that. That decision was not passing on the validity of the injunction, but merely restraining it
29 for hearing before Judge Knoch.

Mr. Kupeck: That is correct. We find no quarrel with that. That is in the order as we think it is corrected.

Mr. Maktos: However, your Honor, this is a double-barreled motion, in which they claim here that they would like to have a motion for restraining order under the complaint herein.

Now, the complaint was for an injunction. The restraining order, sir, stems from the complaint for injunction which you stipulated should be put over before Judge Knoch, and that has not been tested yet, your Honor. It was merely a matter of practice and procedure that you stated would be at hearing on Friday, and I don't see that this motion should be allowed.

The Court: I will be frank with you in this matter. This is Judge Knoch's case and I will want to discuss the matter with him. I will continue it until three o'clock this afternoon. Is that agreeable?

Mr. Kupeck: If counsel here has a transcript of the proceedings before the court last Friday, if he will submit it to your Honor to see what the order was that your Honor entered, I think it would save the court and us time.

30 Mr. Maktos: Your Honor, in this particular case I think this is merely a motion for harassment. I cannot possibly conceive of it—

The Court: I don't think so.

Mr. Kupeck: I don't think so.

The Court: I don't agree with you on that. I think counsel is trying to protect the interests of the Government on that.

If you want to hand me the transcript I will take it, and at three o'clock this afternoon I will try to render it, but I will be frank with you, I will discuss the matter with Judge Knoch, it is his case and, after all, entering any order now after he has returned—there is a question under our rules of my right, and I would certainly want to know that he would consent to my entering any order whatsoever. All I would say to him would be, "Judge, this is your case and you have full right to do whatever you want to, what you think should be done with the record before you."

I want to discuss it with him. Under our rules I think I should not enter an order even vacating my order, even if I vacated it absolutely, without first consulting with him. It is his case, and he is back here. I will see
31 him, and by three o'clock I will be ready to rule on it.

Mr. Kupeck: May I suggest that counsel enter his appearance in this matter? He has not filed an appearance yet.

The Court: I assume that his appearance in court amounts to that, but he should--

Mr. Kupeck: He has never filed an appearance in this matter.

The Court: Didn't he file an appearance?

Mr. Kupeck: No.

The Court: Didn't he file a petition?

Mr. Maktos: Yes.

The Court: That amounts to an appearance. It is just like filing a complaint. When he files a petition it is the same as filing a complaint. If he were a defendant and you had served process it would be necessary for him to file an appearance, but when he files the original petition it is the same as filing an original complaint. His appearance is on file, he is bound.

Mr. Kupeck: Of course, counsel I don't think is a member of the bar of this court.

The Court: He was admitted before Judge Igoe. I went into that matter. He was admitted before Judge
32 Igoe. I knew that and therefore I assumed that the admission there before Judge Igoe would continue to admit him to practice—

Mr. Maktos: In this particular case.

The Court: —concerning this particular litigant. But if there is any question—

Mr. Kupeck: There is no—

The Court: Counsel may now be admitted for the purpose of prosecuting this particular case. It was under another number and another style up there, but if there is any question I will admit him, because he was admitted by Judge Igoe up there, according to what Judge Igoe tells me. So if he saw fit to admit him to practice in the habeas corpus proceeding, that is sufficient here, and his petition, plus the two, so he stands admitted and there is no question about his appearance.

Mr. Maktos: Thank you, your Honor.

(Thereupon the above-entitled matter was recessed until 3:00 o'clock p.m. of the same day, March 3, 1955.)

33

* * (Caption No. 55 C 300) * *

Before Judge Perry,
March 3, 1955,
3:00 o'clock p.m.

Resumed pursuant to recess.

Present:

Same as before.

By the Clerk: 55 C 300, Cantisani *v.* R. H. Holton. Motion to vacate order and enter order nunc pro tunc.

The Court: Gentlemen, we have just adopted a new set of rules, and I went over them, and I believe I am utterly without jurisdiction to enter an order in this. I am going to continue it until tomorrow morning. I did not have a chance to consult Judge Knoch. If he wants me or authorizes me to hear the matter I will do it. But without direct authorization or assignment from him I am
34 without jurisdiction because he is back here. So I will continue it until in the morning at ten o'clock, and I will surely see him by then to see what he wants to do.

It is my understanding, however, that the whole matter on its merits will be up tomorrow.

Mr. Maktos: In other words, the motion that came up before this court this morning—

The Court: It was continued before Judge Knoch, and I will go to him and talk to him about it. If he refers it back to me that is another matter.

Mr. Maktos: I see.

The Court: But I am without jurisdiction under our new rules under these circumstances to enter any order whatsoever. So I must abide by that. I am sorry I didn't realize it this morning.

I looked at those new rules and they are very strict about it, and I think they are proper.

So appear before Judge Knoch tomorrow morning and I will see him, and if he wants to refer it back to me I will be glad to hear it.

Mr. Maktos: Begging the court's pardon, and I know you have had a lengthy day, to clarify my record, since I know there is an outstanding warrant of deportation, it is merely a continuance now—

The Court: That is all it is. It is a continuance
35 of the order presented to me today. I am not ruling in any way, because I am without jurisdiction. If I

did rule it would be without jurisdiction under our new rules.

Mr. Maktos: Thank you, your Honor.

36

• • (Caption—No. 55 C 300) • •

Before Judge Perry,
March 4, 1955,
10:00 o'clock a.m.

Resumed pursuant to notice.

Present:

Same as before.

Mr. Thomas F. Dolan, for Petitioner, was also present.

By the Clerk: 55 C 300, Cantisani *v.* Holton. Motion to vacate order and to enter order nunc pro tunc.

The Court: Judge Knoch indicated that he was going to ask me to hear that matter and transfer it back in here because I knew something of it, and he has quite a program, and he asked me if I would mind hearing it. I said, "It is all right with me if you feel that time is pressing, that you don't have time to hear it, and it happens my program is fairly clear this morning, I finished up a

37 case that I didn't expect to get through with."

We will continue it because I will hear another motion of my own now, and I have a pretrial in there, so I would say it would be about a quarter to eleven to eleven o'clock. At that time we will hear it.

Mr. Maktos: Thank you very much.

(A recess was taken.)

The Court: In this matter Judge Knoch has asked me in this matter of Angelo Antonio Cantisani *v.* R. H. Holton, District Director of Immigration and Naturalization Service in Chicago, Illinois, 55 C 300, to go ahead and complete the hearing in this matter, and under our rules, it being reassigned to me, as I understand it, Judge Knoch being

on the Executive Committee and there being three members of it, he has discussed the matter and while I think the order reassigning it has not yet been signed, may we proceed with the understanding that the matter is assigned to me and that that order will come through in due course, because I don't want any question of jurisdiction under our rules because of its being Judge Knoch's case, and if that is agreeable may it be so stipulated? If not, you
38 have your rights to object, and we will wait until the procedure is completed.

Mr. Kupeck: The Government is agreeable, your Honor.

Mr. Maktos: I see no reason why I should object.

The Court: And you stipulate in the same manner?

Mr. Maktos: Yes.

The Court: All right, gentlemen. Then just be at ease and we will go into this matter as you see fit.

You may proceed.

Mr. Kupeck: May it please the Court—

The Court: Why don't we just go into the merits of the whole situation? Let's have a full hearing.

Mr. Kupeck: I submit to the court that the transcript contains virtually all arguments either side would present, and the Government at this time would like to file a motion to dismiss the complaint and to deny the motion for a temporary restraining order, a copy of which has been personally served upon Mr. Maktos.

The Court: All right. The Government has filed such a motion.

You may proceed on the basis of the motion. I suppose, since you are proceeding first on the motion, it would be your responsibility. You are moving to dismiss the
39 complaint, and I suppose you might proceed with your argument and suggestions to the court in this matter.

Mr. Kupeck: May it please the Court, as the Government has heretofore maintained, the court lacks jurisdiction herein, first, on the ground that the complaint fails to join an indispensable party, the Commissioner of Immigration and Naturalization and/or the Attorney General of the United States.

Further, your Honor, there is no ground, no legal ground, upon which this complaint is founded. The legality of the deportation order can only be attacked by a writ of habeas corpus and not collaterally. The legality of the deportation order has never been and is not now questioned, and there is no writ of habeas corpus pending before the court.

Further, under the general equity powers of the court the court cannot enjoin deportation proceedings, absent any circumstances which allege or demonstrate that irreparable harm and injury will occur to an individual by reason of the application of an unconstitutional law or by the illegal application of a statute otherwise valid.

Further, the complaint for the restraining order, the foundation for which in law the Government has had difficulty finding—it has not been able to find any foundation in law for such a proceedings in the deportation matter—that of course I do not presume to say there is none, your Honor, but we have not been able to find any deportation proceedings.

These proceedings are in reality, your Honor, proceedings against an official of the United States. In a suit brought against the subordinate officer, your Honor, the head of the Department or other superior officer is an indispensable party, and where the relief sought, as here, would require the superior officer to take action, that is, the Commissioner of Immigration and Naturalization, and/or the Attorney General of the United States, either directly or through a subordinate.

Further, the Government maintains that a suit for specific relief against a government officer is an unconsented suit against the United States, and the Government respectfully maintains is beyond the jurisdiction of the District Courts where the relief is sought. Although nominally against the officer, as here, against Mr. Holton, it would actually be against the Government, that is, by affecting the Government's property rights or fune-
41 tions.

As I have heretofore mentioned, the jurisdiction of District Courts over such suits is limited to cases alleging that the officer's action is unauthorized by law or that he is proceeding under an unconstitutional statute.

The Government respectfully maintains, your Honor, that the District Courts outside the District of Columbia have no jurisdiction to issue a writ of mandamus or its equivalent in such a case.

It is difficult to ascertain from the complaint, your Honor, the relief sought by the complainant alien. In his prayer he asks—

The Court: May I ask you right there, is it your thought then that I should transfer this case to the District Court for the District of Columbia, which would have jurisdiction?

Mr. Kupeck: If they had joined either the Commissioner of Immigration, and the court could take judicial notice that his seat is in Washington, D.C., or the Attorney General, and the court would take judicial notice of the fact that his office is in the District of Columbia. That is why this suit must fail. This suit must fail because of the failure to join either one of those two parties
42 whose situs is in the District of Columbia.

The Court: Wouldn't it be a useless gesture to name them in this District? I couldn't get jurisdiction—

Mr. Kupeck: No, you can't get jurisdiction. They must be personally served in the District of Columbia, and the

District Court outside of the District of Columbia has no jurisdiction where either of those parties is named as a party defendant, and before any action can be taken in this case it must be passed upon by the superior officer, either the Commissioner of Immigration and Naturalization, or the Attorney General.

May I return, if your Honor please, to the prayer of the complaint, and I respectfully direct the court's attention to page 3, being paragraph 1.

The prayer, the basis, the fundament, of the complaint is the prayer:

> "for an order restraining the Director of Immigration and Naturalization in Chicago from executing a warrant of deportation on February 27, 1955, towards the end that he may be permitted to move the Attorney General to conduct a fair and adequate hearing con-
> 43 cerning plaintiff's admissibility to the designated country of his choice, and to exhaust his legal remedies according to due process of law, and for such other relief as this court may deem proper."

If the court will permit me, I would like to break that down into its elemental facts.

The prayer, your Honor, goes to discretionary relief of the Attorney General. By addressing his prayer for relief to the Attorney General it brings out two factors: One, that he has failed to here join the Attorney General as an indispensable party; and two, he has failed to exhaust his administrative remedies.

The Court: Yes. What should he do?

Mr. Kupeck: Under paragraph 243(h) of the Immigration and Nationality Act of 1952, he can petition the Attorney General on the basis of physical persecution, whether his deportation should be delayed. This was not done. This is a discretionary matter and it cannot be inquired into and it cannot be compelled by a court. He has failed so to do.

I want to stress to your Honor that—

The Court: Do you think that would even bar a writ of habeas corpus?

44 Mr. Kupeck: Indeed. Furthermore, as to designation, the complainant alien has here designated, according to procedural due process as required by the regulations under the Immigration Act of 1952, embodied in 8 Code of Federal Regulations, where it states that he will state—not in writing—he will state, he will designate by statement his country to which he wants to be deported.

The hearing here sets forth that he did designate Italy. His application for voluntary departure was denied as was within the proper province of the special inquiry officer.

May I revert, your Honor, to this matter of designation? The matter of designation, as opposed to a petition for relief based on persecution, is not discretionary within the province of the Attorney General. The statute says that no alien—this is the statute, giving no discretion to the Attorney General—we must look to Congress—"No alien shall be permitted to make more than one such designation."

The court cannot, nor—I am sorry, your Honor—the Attorney General cannot permit a second designation. He is forbidden by statute, and the discretionary matter, that contained in the prayer, of a fair hearing permitting

45 his designation of his country of his choice, this cannot be done because the Attorney General is barred by statute.

Then, to exhaust his legal remedies according to due process, is addressed under paragraph 243(h), that is, if he claims he will be subject to physical persecution, that is addressed to the discretion of the Attorney General, and he has failed to make the Attorney General a party defendant, he has failed to exhaust his administrative remedies.

The Government maintains that the complainant alien here has been afforded in every sense all substantive and procedural due process, and that the motion for temporary or otherwise injunction or other relief should be here denied by the court.

The Court: The principal complaint as I got it the other day—that is, in argument, if not in the pleadings—was to the effect that this date has been set for Sunday and it does not allow petitioner an opportunity to present his case to a court under a writ of habeas corpus.

Mr. Kupeck: Your Honor—

The Court: Why is the Government not willing
46 then to litigate it in that manner? Why aren't you willing to say, "All right, surrender yourself now" and then if he has a right to let it be tried?

Mr. Kupeck: Your Honor, there has been no complaint—I will explain that, but may I afford your Honor the background? There has been no complaint here at all that the deportation order is not valid. There is no complaint here—it was not appealed from. Even in his complaint for temporary order, there is no complaint about the validity of the deportation order. But, may I explain to your Honor, the date Sunday was picked, as I understand, because at Ellis Island the detention facilities were closed. They have no detention facilities there at Ellis Island. If he had been picked up here on a Saturday and kept overnight, I am sure, your Honor, there would have been much wailing and gnashing of teeth, and an alarm would be held up, "Why are you keeping this man overnight?"

Mr. Maktos: Objection.

Mr. Kupeck: Well—

The Court: He has a right to state his opinion.

Mr. Maktos: I know, your Honor, but in these proceedings I have allowed counsel—

The Court: Just let him finish. I think he has
47 a right to express his opinion. He is just expressing his viewpoint, what he thinks would happen.

Mr. Kupeck: There was nothing done, may I say to your Honor, purely intentionally to deprive this complainant alien of any rights. He was—

The Court: Will the Government demand that he surrender today?

Mr. Kupeck: We have not obtained facilities for his transportation to New York and for passage on a boat.

The Court: Then the Government doesn't want him until they do get those facilities?

Mr. Kupeck: May I say this: There was much ado about his getting out of jail, which the Government permitted because he was complaining of being ill. The Government does not want to take him back into jail and have him complain of being ill again.

The schedule, your Honor, was this: He was told to come in at one o'clock on 27 February 1955.

Mr. Maktos: Sunday.

Mr. Kupeck: Sunday, that is correct, one o'clock in the afternoon. By schedule he would be on a plane in order to catch a ship departing from New York on Monday morning. That is coincidental. If those coincidences are
48 such as to deprive an alien—and I say this hesitatingly —of any so-called rights he may have because of the power of circumstances of an individual who was ordered deported March 13, 1953, and who did not take even step A since that time—ten days ago—I mean, even if in our law—I mean our laws do not extend greater rights to aliens than they do to our own citizens, that is, a man cannot sleep on his rights and then demand that the entire judicial procedure of the United States stop and the Constitution be placed in his hands.

The Court: The only thing that bothers me about it is,

to be perfectly frank with you, that the burden of this complaint is to the effect that he is being deprived of a right to try his case in a habeas corpus proceeding by the procedure. That is the burden of the complaint there.

Mr. Maktos: Your Honor—

Mr. Kupeck: Your Honor, if I may finish—

The Court: That seems to me to be the burden of the complaint.

Mr. Kupeck: Counsel has not indicated that he wanted to file a petition for habeas corpus. He can do that in the Southern District of New York. Before the ship casts
49 off its moorings he can hit them with a writ of habeas corpus.

Furthermore, since last Friday counsel has not taken any steps to submit any kind of petition under this paragraph 243(h). In a week he has done nothing.

The Court: Do you mean to the Attorney General?

Mr. Kupeck: Yes. The prayer he seeks in his complaint.

Mr. Maktos: If the Court please, my contention—

The Court: What do you say about your right to file a writ of habeas corpus in the—

Mr. Maktos: That right, your Honor, is a right which we could have had, and I was referring to the transcript, your Honor, in which in open court I stated that I went to the Immigration Service and I talked to both the Deputy Director and the Director and the head of the Deportation Section, in which I had requested that they allow me to surrender my man so that I could give him the benefit of a writ of habeas corpus.

That was done, your Honor, and I am quite sure that the court will take cognizance of the fact that counsel would not make a statement in open court to that effect if it were not true.

50 Co-counsel in this case, Mr. Dolan, was with me at the time that request was made, your Honor.

The Court: You have requested to submit him.

Mr. Maktos: To submit him. Therefore, I was well aware of the fact, your Honor, that there was a violation of due process.

The Court: Who is your bondsman?

Mr. Maktos: It was put up by a Mr. Petruzio.

The Court: Suppose your bondsman comes in and cancels the bond and surrenders him.

Mr. Maktos: Well, your Honor, that is the proper way that it could have been done. The proper way that this case should have been handled should have been that this man be given due process of law. The proper way that this case should have been handled, your Honor, would have been not to preclude judicial process.

Now we are arguing about the point, your Honor, as to whether or not we have joined the indispensable parties. Immigration is a creation of the legislature, to legislate and only to take care of problems in immigration. Even Congress, your Honor, and I can cite cases to your Honor in which Congress cannot even deport a man without a
51 fair hearing.

Your Honor—

The Court: Has there never been any hearing at all in this case?

Mr. Maktos: There has been a hearing, your Honor. I am not trying to blacken the eye of the Immigration authorities. I know the hearing was held, and I read it.

The Court: Yes.

Mr. Maktos: I call your attention, your Honor, however, to the hearing on April 16, your Honor, in which—

Mr. Kupeck: Pardon me. I hate to interrupt counsel, but I respectfully object to any argument about a hearing. That is not before this court. The court has no jurisdiction to go into that. That can be reached by habeas corpus.

The Court: As to the merits, you are correct.

Mr. Kupeck: As to the merits, that is absolutely moot, because this court has no jurisdiction absent a writ of habeas corpus.

The Court: I will grant you that as far as the hearing, there is no question it is moot, but in order for me to understand what all has taken place it is more or less
52 my request that it be read. Go ahead.

Mr. Maktos: Your Honor, the alien was notified of a hearing before Jerome T. McGowan, the Special Inquiry Officer, in which counsel, your Honor, stated:

> "At this time I would like to move that the hearing in this matter be continued, and the basis for my request is that the notice of the hearing was served upon the alien only this morning," your Honor, "and I received a telephone call which notified me of the fact within the past hour."

Whether the alien knew his counsel at that time, whether he had to go out and bring counsel in, your Honor, he had one hour in which to come in to a hearing.

I respectfully submit, your Honor, that under Title 8, Part 2, Point 52, Code of Federal Regulations, it is definite in that a reasonable time and the nature of the charges should be made available to the respondent and/or his counsel at that time, and prior to the special inquiry officer's hearing, at such reasonable time as the respondent or counsel may need to prepare.

I further go into the hearing, your Honor, and state that counsel was given time of two weeks, at the request
53 of counsel at the special inquiry officer's hearing. However, counsel also stated that he was then tied up in a lawsuit which might take the entire time that he sought to prepare. So in reality counsel was in court and only asked for such time as to dispense with such matters as he had on hand, and then to come in to a hearing, at which time he had never conversed with the alien, since he does

not speak English, never apprised him of his rights and the regulations—

The Court: Who was counsel? Was that you?

Mr. Maktos: No. Joseph Green, your Honor.

The Court: Oh yes. Go ahead.

Mr. Maktos: My client, your Honor, was not apprised of the regulations which stipulate that in the event that you want designation or voluntary departure it must be submitted in writing prior to the hearing, your Honor. These are rights that he had. These are rights that he did possess, that he should have taken advantage of, your Honor. The entire hearing, your Honor, on pages and pages of testimony here, can show that it was not a fair hearing.

The Court: I cannot go into the merits—

Mr. Maktos: I know you can't, your Honor, and therefore I respectfully submit—

54 The Court: I am not interested in the merits of it.

Mr. Maktos: But the due process of law was not accorded my client. The Fifth Amendment stays—

The Court: That you can only raise in a habeas corpus proceeding.

Mr. Maktos: I appreciate that, your Honor, but can your Honor tell me where judicial process is denied my client, how can I possibly get into the courts under writs of habeas corpus? It makes no difference as to a date. I asked to let me surrender him. We came in here under injunction because it is the only—

The Court: How did they refuse? In what manner did they refuse?

Mr. Maktos: It is discretionary. I mean, counsel for the Government stated here, your Honor, that they don't have to accept him. We could drop the bond and they don't have to take him. There is nothing in the rules here that stipulates that if bond is denied that they can or cannot

pick him up. That is discretionary. The word "discretion" in this case is a cureall for any adaptation that they may want to have it take.

The Court: Then what would hinder you from seek-
55 ing a writ of habeas corpus in the Southern District of New York, or wherever it might be?

Mr. Maktos: But, your Honor, I don't know on what plane the Government is going to take the man, or on what ship they are going to put this man, or at what time they are going to do this. The ship could have been leaving at seven o'clock on Monday. I don't know that that was the time of its departure. It may have been at twelve o'clock midnight, your Honor. I don't know.

I mean, I am being asked to file a writ in a state that I don't know exists, at a time when I don't know a boat will leave, under conditions of which I am not apprised. If I were clairvoyant—

The Court: You don't even know whether he is going by New York.

Mr. Maktos: I don't even know he is going by plane. I don't even know that he is going into New York. I don't know the answers to any of these questions, your Honor.

I respectfully submit that if that is not a violation of due process and if that is not precluding his judicial rights, then I have no claim here, your Honor.

Mr. Kupeck: Is counsel through?

56 Mr. Maktos: Yes.

Mr. Kupeck: May it please the Court, if the Court will permit me at this time, despite my own objection about going into the merits of the hearing—

The Court: Well, it has been opened up.

Mr. Kupeck: Merely to answer counsel.

Counsel mentioned the fact that he was given one day notice, and then counsel, Mr. Green, very competent counsel, requested and obtained a continuance of sixteen days.

and no additional time was requested. There was no question at any time along the hearing—Mr. Green certainly could have had more time. That is not material.

Mr. Maktos: All I am saying is that he did not ask for it.

Mr. Kupeck: The matter of designation, your Honor, and I fear I am repeating myself, is set forth in the Code of Federal Regulations set forth in the Government's motion, that the alien will be requested to state. It is not required under the regulations which has the force of law that he submit it in writing. Furthermore, counsel argues that the discretion is a cureall or panacea. He must, your Honor, look to Congress and not to the courts, because
57 Congress has attributed to the Attorney General and to the Commissioner this discretion.

The Court: Let me ask you this: If this case is dismissed, the man has already been ordered to report, and he must report now?

Mr. Kupeck: He has been ordered to report.

Mr. Freedman: No, your Honor.

The Court: Have you withdrawn that order?

Mr. Freedman: We have to wait until we can get reservations for another boat.

Mr. Kupeck: Counsel has never asked—

The Court: Informally—

Mr. Freedman: The bondsman was advised that he does not have to bring the alien in.

Mr. Maktos: That is right.

The Court: Well, gentlemen, we will just terminate this in this manner: This suit will be dismissed. My telephone number is Glen Ellyn 1062, and I am there most all the time, and if you want to bring a writ of habeas corpus you can file one in the proper procedure. This is not the proper procedure, in my judgment, but you can reach me on Sunday or any other time, as far as that is concerned, and

if there is a good writ of habeas corpus I will consider it.

58 What I will do with it I don't know, but I will consider it, because I want the man to have his rights. But this is not the proper procedure. I have gone into it myself and I am convinced that counsel for the Government is right, that this is not the proper procedure, and this cause is dismissed, which of course also dismisses the order entered heretofore.

But so that the alien will not be deprived of any of his rights, as far as that is concerned, I am available at any time.

Mr. Maktos: All right. And that telephone number again, your Honor, is—

The Court: Glen Ellyn 1062 is my home telephone number. It is in the book. I never hide out.

Mr. Freedman: May I say this, your Honor, on behalf of the Immigration Service: We do not know when the alien will or will not be called again. Making reservations for a boat to Italy is a little difficult, and when we do have one we would like to take him on and send him as soon as we can.

The Court: Why don't you take the man in custody and let him file a writ and litigate it all before you fix up reservations? Apparently he is going to litigate it here or somewhere else.

59 Mr. Maktos: Yes.

The Court: Why cause yourself and everybody else trouble, when we know he is going to litigate it?

Why not accept the man and then let him make a bond and take him out on a writ, and be done with it, rather than to have it done all in a rush, causing you trouble and causing cancellations? Why not litigate that matter beforehand and save yourself trouble? I don't care myself.

Mr. Maktos: Counsel will only be too happy to file a writ of habeas corpus at his earliest possible convenience and comply in any way with the immigration—

The Court: It would be a moot question now. It would be denied automatically.

Mr. Maktos: It would. All I am asking of the court is that—I am prepared to do it at any time that the Department will allow me to surrender him.

The Court: I believe in personal liberty, and I would not refuse one if they came to my house at midnight, as far as I am concerned.

I took an oath to observe the Constitution. What rights you would have under it, granting a writ of habeas corpus would not indicate—

60 Mr. Maktos: Oh no.

The Court: —in any manner the ultimate rights.

It sounds to me the man has had a pretty complete hearing.

Mr. Kupeck: Yes.

The Court: It sounds that way, but while it sounds that way I wouldn't know unless I had a full hearing.

Mr. Kupeck: Your Honor, there have been intimations here by Mr. Maktos and Mr. Dolan who remind that February 27 was a Sunday.

No counsel had ever inquired of the Immigration authorities when he was being deported, on what plane or what ship. Nobody inquired. That information was available to them.

The Court: The Immigration Department has its problems.

Mr. Kupeck: Yes.

The Court: I am cognizant of the fact that it has lots of problems and it can't solve them all.

Mr. Kupeck: They could have asked and have been told.

Mr. Maktos: I asked a lot of questions of the Immigration authorities and I received no answers.

The Court: Well, of course, they have their duties to perform.

61 Mr. Maktos: I can appreciate that. I am not in any way, your Honor, trying to detract from the Department service—I know that their job is—

The Court: All I entered the order for the other day was that I expected the matter to come before Judge Knoch and I wanted to give the man a full hearing to afford him an opportunity to exercise his civil rights.

Now Judge Knoch has returned it to me, and I am satisfied that no permanent order could be entered on this petition. The court is without jurisdiction, I think, to entertain it and, therefore, it is dismissed. But I have told you what my viewpoint is concerning the right to file the writ.

Mr. Maktos: Thank you very kindly, your Honor.

62

IN THE UNITED STATES DISTRICT COURT

• • • (Caption—No. 55 C 300) • •

I, Edward Newlander, do hereby certify that I reported the proceedings had in the above-entitled cause before Hon. J. Sam Perry, one of the Judges of said Court, on March 3 and 4, 1955; and that the foregoing (commencing page 27) is a full, true and accurate transcript of said proceedings.

/s/ Edward Newlander,
Official Court Reporter
United States District Court
Northern District of Illinois.

March 8, 1955.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 832

UNITED STATES OF AMERICA, ex rel. ANGELO ANTONIO CANTISANI,

Petitioner,

vs.

R. J. HOLTON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE OF CHICAGO, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

PROTAGORAS DIMITRIOS MAKTOS
c/o ARCHIBALD J. CAREY
188 W. Randolph, #1501
Chicago, Illinois
Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No.

UNITED STATES OF AMERICA, ex rel. ANGELO ANTONIO CANTISANI,

Petitioner,

vs.

R. J. HOLTON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE OF CHICAGO, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Angelo Antonio Cantisani, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals, for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on the 1st day of November, 1956, and is not

reported, but appears in the record filed with and certified by the Clerk of the United States Court of Appeals; which is transmitted herewith. The record was printed for use in the United States Court of Appeals, for the Seventh Circuit.

The opinion of the United States Court of Appeals, for the Seventh Circuit, affirming said judgment was filed October 2, 1957, and was reported (248 F. 2nd, 737), and is set forth in the Appendix hereto and in the certified copy of the record.

JURISDICTION.

On December 4, 1957, it was ordered that the petition for rehearing be denied. (This order appears in the Appendix hereto.) This petition is filed within ninety days after the denial of the petition for rehearing in the United States Court of Appeals, for the Seventh Circuit. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED.

The petitioner concedes that the law clothes the Attorney General with the discretionary right to make a judgment when the requirements of due process have been properly met. Petitioner further may concede that the procedural requirements have been duly met, however, petitioner would vigorously urge the careful consideration of the following questions:

1. Did the Immigration & Naturalization Service violate the Fifth Amendment of the Constitution of the United States by arbitrarily and capriciously denying petitioner the right of Habeas Corpus? If so, was it re

versible error when the United States District Court, for the Northern District of Illinois, Eastern Division and the United States Court of Appeals, for the Seventh Circuit, did not take judicial notice of the denial of due process of law?

2. Is the scope of review narrow in the Courts when Due Process is denied, and there is arbitrary abuse of discretion by an agent or agency?

3. Does the Attorney General's refusal to grant relief to a statutorily eligible alien entitled to relief, when the alien has complied with all provisions and requirements of the Section constitute an abuse?

A. Does the decision of the Attorney General constitute an abuse when he has not fairly and justly considered the evidence presented, when the decision is contrary to the evidence and the requirements and provisions for relief under the Section have been met?

B. Should the terminology "legal discretion" and "absolute discretion" be clarified or defined?

4. Was it the intent of Congress when it vested the Attorney General with the power of discretion, to preclude the Courts from substituting their opinion, when the Attorney General granted a hearing, received evidence and rendered a decision?

5. Is the law to be interpreted that a government agency can accord a petitioner procedural due process by complying with provisions and requirements, make a decision and that the decision is irrevocable and not reviewable, even though the decision is not substantive due process?

6. What evidence would be required to justify a conclusion for relief under Section 243 (h) if the evidence submitted in this ~~case is not~~ perceived to be adequate?

STATEMENT OF THE CASE.

1. The petitioner is an alien, from Italy, born October 1, 1908. His only entry into the United States occurred in Baltimore, Maryland, on February 19, 1949, when he arrived aboard the S. S. Georgio and was smuggled into this country. The record proves that the petitioner fled from Italy for his life. The petitioner was persecuted by the communists, he was beaten and was in fear of his life. Petitioner is married to a native of Italy, there are three children born of this marriage. Petitioner, as the record shows, has supported his family since his arrival in the United States.

2. The petitioner is a person of good moral character and has been available to the Immigration and Naturalization Service at all times.

3. On February 25, 1955—Case No. (55C300)—in the United States District Court, for the Northern District of Illinois, Eastern Division, there was filed a complaint for restraining order (Sup. Appendix) seeking relief from the arbitrary, capricious action of the Immigration & Naturalization Service to deport petitioner on Sunday (a legal holiday) and deny him due process of law.

4. On March 4, 1955, the Honorable J. Sam Perry dismissed the suit because he felt it was not proper procedure (Sup. Ap. P 36a-37a), but went on to say that petitioner was deprived of his rights.

5. On March 22, 1955, petitioner filed with the Immigration & Naturalization Service a petition for a stay of deportation and a hearing under Title 8-Sec. 243(h),

Sec. 243.3, (Ap. P 148, 149-150) and was accompanied by affidavit of petitioner. Ex. 2.

6. On March 30, 1955—letter of clarification to R. H. Holton, District Director of Immigration & Naturalization, Chicago, Illinois, requesting disposition of petition filed March 22, 1955. (Ap. P 151 and 225). Ex. 3 and Ex. 42.

7. April 4, 1955—Regional Commissioner of Immigration & Naturalization at St. Paul, Minnesota denied relief and ordered petitioner deported on April 6, 1955.

8. The thirty days given petitioner to obtain affidavits substantiating physical persecution had not expired.

9. A long distance telephone call to the Regional Commissioner in St. Paul, Minnesota on the 5th day of April pointing out that there had not been a hearing under Section 243(h) brought forth a stay of deportation for thirty days. (Ap. P 228-229) Ex. 42.

10. Prior to the expiration of thirty days, thirty-two letters attesting to the physical persecution of petitioner were made part of the record. (Ap. P. 151-181 inclusive).

11. On June 10, 1955, petitioner received a letter from the Immigration & Naturalization Service informing him to prepare for deportation on June 13, 1955; which was a Monday.

12. On June 13, 1955 a petition for a writ of habeas corpus was filed under adverse conditions. (Ap. P 10-23) (Case No. 55C866).

13. On November 1, 1956 order dismissing petition was entered. (Ap. P 109-110).

EVIDENCE.

The evidence consists of forty-two exhibits in petitioner's Appendix, the Supplemental Appendix *in toto* and excerpts from the transcript of proceedings before the Honorable Philip J. Sullivan. Further, statements by the U. S. Attorney for the United States in the proceedings before the United States Court of Appeals for the Seventh Circuit.

Petitioner obtained from Italy 32 letters susbtantiating Petitioner's claim to physical persecution. They include, the Mayor of the Village of Sassano, the doctor who had treated petitioner for the bodily harm perpetrated, the ecclesiastical members of the church and school in Sassano, Italy. Members of the Police Department, Tax Office and Military Office, his wife and friends. (P. A. Ex. 5-37, pages 153-181)

Petitioner is and has shown that he is of good moral character, his obligations to his wife and children have not been shirked. Affidavits, attesting to his character and morality while in the United States have been made of record. He is and has proven that he is industrious and has adhered to the laws of our country since his entry. He has paid his taxes, attended the church of his faith and has been held in high esteem by the members of his community.

Petitioner has proven unequivocally that he is entitled to relief under Sec. 243(h) of the C. F. R. and Petitioner was denied due process of law. (Sup. Ap.)

REASONS FOR GRANTING WRIT.

1. The importance of this case lies in the fact that it presents important questions of federal law.

2. Of prime importance, a human life may hang in its balance

A. Petitioner was denied due process of law. (Sup. Ap. 29a, 35a, 37a, 38a)—which is a Constitutional Guarantee—(5th Amendment of the Constitution of the United States) *Yick Wo* v. *Hopkins*, 188 U. S. 356, 369, quoting the Fifth Amendment and further stating:

> **"to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality."**

Kwang Hai Chew v. *Caiding*, (1953) 344 U. S. 590, 73 Supreme Court on pages 477 and 478, the Court says:

> **"Although Congress may prescribe conditions for his expulsion and deportation, not even Congress can expel him without allowing him a fair opportunity to be heard."**

B. The record shows that a hearing for relief under Title 8, C.F.R. Sec. 243(h) and Sec. 243.3 were granted to petitioner. (Petitioner's Appendix, pp. 148-149-150) These hearings were procedural and not substantive (they bring to mind the hanging Judges of the old West—Rights without remedies) and not in conformity with the regulations. A letter dated March 30th, 1955 seeking clarification and pointing out grievances (P.A. Ex. 3, pages 151-152) to the District Director, again we point to *Kwang Hai Chew* case, 73 Supreme Court, footnote No. 7, where the Court said:

> **"When the condition requires a hearing it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."**

Mastropasqua v. *Shaughnessy*, C.A.N.Y. 180 Fed. 2nd 999, wherein the Honorable Judge Jerome Frank delivered the opinion of the court joined by Honorable Judge August Hand:

> **"but, in appropriate circumstance, they can compel correction of an abuse of discretion or can compel an official to exercise his discretion where he has obviously failed or refused to so do. Such an obvious re-**

fusal occurs, we think, when an official sets up a class of cases as to which he refuses ever to exercise any discretion, one way or another, if that class is not rationally differentiated from the other cases, not within the class where he uses his discretion case by case."

C. The fact that the Immigration and Naturalization Service did not allow petitioner the time to support his claim of physical persecution with the exception of a long distance phone call to the Commissioner at St. Paul, Petitioner would have been deported and would have been subject to physical persecution or death. It is inescapable that the conclusion should be, that the Immigration and Naturalization Service were abusing their discretion. (P.A. 73-74-75) *Duncan* v. *Missouri*, 152 U. S. 377, page 382, the Court says:

and due process of law and equal protection of the law are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Darnell v. *Tomelson*, 220 F.2nd 894, the court said:

"Aliens who have passed through our gates, even illegally may be expelled only after proceedings conforming to traditional standards of fairness, encompassed in due process of law."

On page 100 of the P. A. the U. S. Attorney stresses the word *opinion* in the modification of language of Sec. 243(h).

It is inconceivable that the decisions of our great jurists meant to confer such power as to allow anyone delegated with authority to flagrantly hide behind procedural compliance with disregard for proper considerations of evidence and fairness in conclusion.

The Attorney General's refusal to grant relief to a statutorily eligible alien seeking relief by virtue of the delegated authority vested in the Attorney General by

Congress is reviewable by the courts, as it constitutes an arbitrary abuse. *Carter* v. *Carter Coal*, 228 U. S. 291; *Mastropasqua* v. *Shaughnessy*, C.A. N.Y. (1950) 180 F. 2d 999.

A perfect case—beyond any question of complying with the law and provisions of a statute—would be helpless in the light of that interpretation of discretion conferred upon the Attorney General. Should the Attorney General in his discretion and opinion decide arbitrarily.

D. On September 9, 1957, before the United States Court of Appeals, for the Seventh Circuit, counsel was asked if he thought that this Court could substitute its opinion for the decision of the Immigration and Naturalization Service. Counsel's answer was that it could not if there had been no abuse of discretion. However, the record showed that there had been an abuse of discretion. A further question was asked: "If the petitioner were returned to any other city in Italy was there any proof that he would be physically persecuted". If the court meant that a requirement to comply for relief under Section 243(h) was to evidence and substantiate by proof that the petitioner would or would not be physically persecuted if returned to any other city in Italy such requirement would render the statute unworkable. In the light of the statute we submit that the question of physical persecution in any other city in Italy is not required. Congress in its wisdom used language limiting the statute to any country. This court we are sure would agree, if a hearing were granted, evidence received and considered and the conclusion was against the weight of the evidence to such an extent that it was arbitrary, that the courts indeed have the authority, capacity and responsibility to declare the decision of the Immigration and Naturalization Service an arbitrary abuse of discretion. If this kind of evidence submitted in this case is not sufficient to justify the conclusion that the petitioner would

be subject to physical persecution, and is not perceived as adequate to comply under the statute, when there is not a scintilla of contrary evidence to the evidence submitted, and accepted without question and later declared as unquestioned evidence by the Immigration and Naturalization Service, there could be no evidence held as sufficient to comply under the statute.

Wong Yang Sung v. *McGrath*, 338 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 9 (1950):

> **"Where the Court interprets the words 'required by statute' to include what the courts had read into the statutes to make them conform to the requirements of due process."**

CONCLUSION.

While petitioner recognizes that there are many cases urgently requiring the attention of the Supreme Court, it is respectfully submitted that for the foregoing reasons stated in this Petition for Writ of Certiorari and because the framers of the Constitution wisely gave protection to those who were not afforded due process of law and because human life may be at stake, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PROTAGORAS DIMITRIOS MAKTOS,
Attorney for Petitioner.

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11972 SEPTEMBER TERM AND SESSION, 1957

UNITED STATES OF AMERICA ex rel. ANGELO ANTONIO CANTISANI, *Petitioner-Appellant*, v. R. J. HOLTON, District Director of Immigration and Naturalization Service of Chicago, *Respondent-Appellee*. } Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 2, 1957

Before DUFFY, *Chief Judge*, and FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. Petitioner, detained under a writ of deportation, filed a petition for a writ of habeas corpus in the District Court. The writ was denied. Our concern here is not with the main deportation proceeding.

Petitioner cannot properly claim that he was denied procedural due process. Petitioner entered this country illegally in February, 1949. He was given a hearing by the Immigration authorities on April 16, 1953. He had three separate hearings. Prior to the first hearing he was given on request of counsel, three weeks additional to prepare for the hearing. Later he was given a thirty-day

continuance, and after he was ordered deported, he was granted a further extension of thirty days in order to secure evidence. He filed petitions for three writs of habeas corpus in the United States District Court for the Northern District of Illinois. During the pendency of the last hearing, Judge Sullivan granted a continuance so that the immigration authorities could hold a *de novo* hearing pursuant to the provisions of §243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. §1253 (h)).

Petitioner is a native and citizen of Italy. His only entry to this country was in February, 1949, at Baltimore, Maryland, from an Italian ship where he had been a stowaway. He testified that he had paid a person in Genoa, Italy, 800,000 lire in order to be smuggled into this country. At the time of entry, petitioner intended to remain permanently in the United States, and did not have an immigration visa.

Petitioner designated Italy as the country to which he should be deported in the event he was ordered deported pursuant to law. There is no evidence that he has had any connection with any subversive groups either within or outside the United States. There is also no question but that he has been a person of good moral character within the preceding five years, and was statutorily eligible for voluntary departure.

Petitioner was married to an Italian woman in 1932. Three children were born of this marriage in Italy and have been residing with petitioner's wife in that country. No one in the United States is dependent upon him for support. He owns no property in this country. The record shows that he helped support his family in Italy by sending them money from time to time.

The real issue in this case is whether the record discloses an abuse of discretion by the Attorney General. Section 243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. § 1253(h)) provides: "The Attorney General is authorized to withhold deportation of any alien

within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

Petitioner atempted to prove largely by letters from officials and residents of the Village of Sassano, Province of Salerno, Italy, that if Petitioner returned to the Village of Sassano he would be subject to persecution and abuse by Communistic elements. As an illustration of such letters which were received and considered by the hearing officer, was a letter from the Mayor of Sassano which read, in part: "Said individual (Petitioner) until the time of his immigration to the United States was a lumberman. As a result of a controversy with the Provincial Chamber of Labor of a communistic shade, became persecuted by some people who in the pretended attitude of defending the rights of the workers, were about to ruin him financially and professionally. The local Communists were after this man for some time. • • •" Other letters as well as testimony of Petitioner disclosed that Communists in Sassano broke Petitioner's leg in 1942, stole some of his lumber and threatened his life. Petitioner insists that his life would be in danger if he returned to the Village of Sassano.

In the field of immigration and nationality, Congress has vested wide discretionary powers in the executive branch of the government. *United States of America ex rel. Moon* v. *Shaughnessy*, 2 Cir., 218 F. 2d 316, 318. The Attorney General or his delegate has been given a wide area of discretion in those cases where the alien believes that he would be subjected to persecution if deported to a specified country. *United States ex rel. Dolenz* v. *Shaughnessy*, 2 Cir., 206 F. 2d 392, 394. However, where an alien has been accorded procedural due process and his application has received fair consideration, courts may not substitute their judgment for that of the Attorney General or his representative. See, *United States ex rel. Ciannamea* v. *Neelly*, 7 Cir., 202 F.2d 289, 293.

The comparable section to §243(h) in the predecessor statute (§23 Internal Security Act of 1950, 64 Stat. 1010) provided: "No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution." The change in language in the present statute has been interpreted by the courts as indicating an attempt by Congress that in cases where the alien claims he would be subjected to physical persecution, the determination of such claim shall rest in the administrative judgment and the opinion of the Attorney General or his delegate, *United States ex rel. Dolenz* v. *Shaughnessy*, 2 Cir., 206 F. 2d 392, and *United States ex rel. Moon* v. *Shaughnessy*, 2 Cir., 218 F.2d 316, assuming, of course, the alien has been afforded procedural due process and that the hearings as conducted were not manifestly unfair to him.

In spite of inferences in some of the unsworn letters, there is no proof in this record that the authoritiies of the Village of Sassano, admittedly noncommunist, could not afford protection to petitioner. He owns a home there, his wife and three children have resided there continuously. Furthermore, petitioner has been ordered deported to Italy and not to the village of Sassano. There is no proof that other places in Italy would not be safe for petitioner. Judicial notice may be taken that the existing government in Italy is controlled by the Christian Democratic party which has a long record of antagonism to Communism.

We hold petitioner has not established that the Attorney General or his designate has been guilty of abuse of discretion in denying Petitioner relief under §243(h) of the Immigration and Nationality Act of 1952. Also, Petitioner was afforded due process. The District Court was correct in denying the petition for a writ of habeas corpus.

AFFIRMED.

FINNEGAN, *Circuit Judge, concurring.* *Hintopoulos* v. *Shaughnessy*, 353 U. S. 72 (1957) decided earlier this year, underscores the scope and nature of discretionary suspension of deportation and for that reason I would mention it when joining in and approving Judge Duffy's opinion. When Congress confers power on a public official in terms of discretion there is little room for judicial interference with the exercise of such authority in the absence of clear abuse. The persistent wave of cases seeking review where discretion has been utilized approach the question in oblique fashion. For the attack should be leveled only when discretion is abused, unless there is an unconstitutional delegation of the discretionary power.

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No. 832

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA EX REL. ANGELO ANTONIO CANTISANI, PETITIONER

v.

R. J. HOLTON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE OF CHICAGO, ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 832

UNITED STATES OF AMERICA EX REL. ANGELO ANTONIO CANTISANI, PETITIONER

v.

R. J. HOLTON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE OF CHICAGO, ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (Pet. App. 1a–5a) are reported at 248 F. 2d 737. The order of the District Court appears at R. 109–110.[1]

JURISDICTION

The judgment of the Court of Appeals was rendered on October 2, 1957. A petition for rehearing was denied on December 4, 1957. The petition for certiorari was filed on March 4, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] "R." designates petitioner's appendix in the Court of Appeals now before this Court.

QUESTION PRESENTED

Whether the administrative decision denying petitioner's application under Section 243 (h) of the Immigration and Nationality Act of 1952 for relief from deportation to Italy on a claim that he would there be subject to physical persecution constituted an abuse of discretion.

STATUTE INVOLVED

Section 243 (h) of the Immigration and Nationality Act of 1952, 66 Stat. 214, provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

STATEMENT

Petitioner, a native and citizen of Italy, illegally entered this country in February 1949, at Baltimore, Maryland, as a stowaway concealed on an Italian ship. He entered without an immigration visa, intending to remain permanently in the United States (R. 49–51). Following hearings on March 31 and April 16, 1953, before a Special Inquiry Officer (R. 44–55), petitioner was ordered deported under Section 241 (a) (1) of the Immigration and Nationality Act of 1952 as an alien who was excludable at the time of his entry, on two grounds: (1) as a stowaway under Section 3 of the Immigration Act of 1917; and (2) because not in possession of a valid immigration visa in violation of Section 13 (a) of the Immigration Act

of 1924.[2] During the deportation hearing, the Special Inquiry Officer advised that his decision was final unless appealed to the Board of Immigration Appeals (R. 54). No such administrative review of the order was ever sought (R. 71, 82–83).

On April 30, 1953, a private bill (H. R. 4966) was introduced in the House of Representatives for the purpose of granting petitioner permanent residence in this country (R. 71, 195). Thereafter, on May 29, 1953, further investigation was had into petitioner's status before Immigration Investigator R. J. Devlin (R. 193–198). At this investigation petitioner was asked to explain why he could not return to Italy. He answered (R. 197):

> There's no work or means of livelihood for me. In the United States I am earning a living and support my family. I want to become a citizen of the United States. * * *

The bill introduced on petitioner's behalf did not pass.

Thereafter petitioner filed a petition requesting that deportation be withheld under Section 243 (h) of the Immigration and Nationality Act of 1952 (R. 146–150), permitting a stay of deportation if in the opinion of the Attorney General the alien would be subject to physical persecution. After opportunity to present evidence before a deportation officer (R. 202–221), an order was entered by the Regional Commis-

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[2] He was denied the discretionary relief of voluntary departure, "[u]pon consideration of the entire record and particularly the manner in which [he] effected his entry into the United States * * *" (R. 42, 41–43).

sioner finding that petitioner would not be subject to physical persecution if deported to Italy (R. 124).

This order was, in effect, withdrawn when on August 29–30, 1955, petitioner was permitted to present evidence before a Special Inquiry Officer, as required by the amended regulations (R. 221–246). Before any administrative decision was reached, the Regional Commissioner, on November 29, 1955, directed that the evidence be presented before a Special Inquiry Officer who was also an attorney (R. 124). The evidence adduced before that officer on January 19, 1956, may be summarized as follows:

Petitioner testified that he had been a resident of the Village of Sassano, Province of Salerno, Italy, before his departure to the United States; that his wife and three children resided in Sassano in a home he owned; that he had been a self-employed carpenter while in Italy and that his equipment was now being used by his children (R. 128–130). He further stated that under compulsion he had been a member of the Fascist Party for a few months before the end of the war; that he had not been active in that organization, nor in any political organization in Italy (R. 130–131). His claim of persecution derived, he testified, from an incident in 1942 when "some Communist fellows" in Sassano attacked him and broke his leg because he refused "to join them" (R. 131). He believed that they were members of the Communist Party (R. 133), and was afraid "that they are going to kill me if I am going to go over there" because of "what they have done to me in the past"

(R. 134–135). Upon advice of counsel petitioner refused to answer questions as to whether he feared persecution from the Italian Government (R. 135–136), and as to whether he could return to some place in Italy other than Sassano (R. 136). The Special Inquiry Officer made part of the record the transcript of testimony at the deportation hearing in April, 1953, which showed that petitioner designated Italy as the country to which he should be sent in the event he was found deportable (R. 137). Furthermore, the Special Inquiry Officer introduced petitioner's testimony given on May 29, 1953, in which in response to a direct question as to his reasons for not wanting to return to Italy he did not mention that he feared persecution from Communist elements (see *supra*, p. 3). Petitioner refused to answer questions concerning his testimony at these earlier proceedings (R. 136-138).

Petitioner further sought to substantiate his claim of persecution by submitting a number of letters from residents of Sassano to the effect that he had had trouble with a Communist element, and that he would be in danger if he returned (R. 153–182). One of these letters was from the Mayor of Sassano stating that, "[a]s result of a controversy with the Provincial Chamber of Labor of a communistic shade, [petitioner] became persecuted by some people who in the pretended attitude of defending the rights of the workers, were about to ruin him financially and professionally. The local communists were after this man for some time" (Ex. # 21; R. 169-170). None

of the letters identified more specifically the people allegedly "after" petitioner. The Special Inquiry Officer recommended that petitioner's application for Section 243 (h) relief be denied (R. 118–122). On March 5, 1956, the Acting Regional Commissioner rendered an opinion approving such recommendation (R. 114–118). He pointed out (R. 116–117):

> The sole point at issue is whether or not this alien would be subject to physical persecution if deported to Italy at this time. In considering this issue, it has been definitely established by the record that the applicant's claim to past physical persecution and to fear of future physical persecution has been and is still centered in the Village of Sassano, Italy. The reason for past persecution and future fear of persecution is extremely vague. The applicant has testified that he was a member of the Fascist Party in Italy for only one month. He further testified that he has never participated in politics in any way either in Italy or in the United States, although he claims to be a member of the Christian Democratic Party of Italy. By religion, he is a Roman Catholic. According to the census of 1931, 99.6% of the Italians were Catholics. He, therefore has no reason to fear persecution on account of his religion. There has been no evidence submitted that any Italian has ever been persecuted in Italy on account of his race. The Village of Sassano is in the Province of Salerno, southern Italy, with a population of 2614 according to the census of 1936. There has been no evidence presented to indicate that any place in Italy other than this small

Village of Sassano was or would be unsafe for the applicant. He has never taken part in any activity which would cause him to be known anywhere in Italy outside of this Village. Furthermore, there has been no evidence presented to show that the lawful constituted authority in this Village is unable to protect the citizens of this community from any minority group.

Administrative notice must be taken that Italy is a Democratic Republic and that the existing Government controlled by the Christian Democratic Party is solidly in control of the country and has the power, the will, and the ability to prevent the persecution of minority groups or individuals. * * *

* * * the Act itself does not specify nor limit deportation to a particular village, town, or city but to a country as a whole. Should the applicant consider the Village of Sassano to be unsafe or undesirable at the present time, he could establish his residence in a city of Italy where he is unknown and would be safe from alleged communists now in Sassano.

Petitioner instituted habeas corpus proceedings attacking the denial of his application for a stay. On November 1, 1956, the present petition for a writ was denied by the district court (R. 109–110).[3] The Court

[3] This petition for a writ of habeas corpus was originally filed on June 13, 1955 (R. 6–8) and amended on June 17, 1955 (R. 25–31). Hearing thereon was postponed until November 1, 1956 (R. 34–35, 58, 63–64, 65–105). During the interim petitioner was afforded the last two opportunities to present evidence on his 243 (h) application by the Immigration Service. In all, petitioner filed three writs of habeas corpus attacking various

of Appeals affirmed, holding that petitioner had failed to establish that denial of his application for relief from deportation under Section 243 (h) constituted an abuse of discretion (Pet. App. 1a–4a).

ARGUMENT

Petitioner concedes that "the procedural requirements have been duly met" (Pet. 2) in the proceedings conducted pursuant to his application for relief from deportation under Section 243 (h) of the Immigration and Nationality Act of 1952. He argues, however, that the adverse administrative decision was unsupported by the evidence and thus constituted an arbitrary abuse of discretion. This contention is unfounded.

Section 243 (h) relief constitutes a privilege to be granted when in the "opinion" of the Attorney General deportation would subject an alien to physical persecution. It is unrelated to the basic issue of the alien's "right to remain in the United States * * *." *United States ex rel. Dolenz* v. *Shaughnessy*, 200 F. 2d 288, 291 (C. A. 2), certiorari denied, 345 U. S. 928. Consequently, the courts refuse to disturb a determination adverse to the alien unless "the Attorney General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien," *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392, 395 (C. A. 2), for "[t]he hearing is not the classical administrative

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aspects of the immigration proceedings, all of which were denied (R. 83-84).

hearing wherein the hearing officer must be upheld in his decision if there is substantial evidence to support it, but it is one in which the Attorney General may be advised by the alien as to the basis of his fears." *Namkung* v. *Boyd*, 226 F. 2d 385, 388 (C. A. 9). See also, *United States ex rel. Leong Choy Moon* v. *Shaughnessy*, 218 F. 2d 316 (C. A. 2); *Feng Yeat Chow* v. *Shaughnessy*, 151 F. Supp. 23, 25–26 (S. D. N. Y.); *Lukman* v. *Holland*, 149 F. Supp. 312, 316 (E. D. Pa.).

In this case, petitioner was afforded every opportunity to support his contentions and the evidence he submitted was fully considered by the administrative authorities. The conclusion that he failed to make out a case warranting relief was fully justified. The sum of petitioner's claim was a vague assertion that certain unnamed, unidentified alleged Communists in the Village of Sassano, Italy, acting without official sanction, would seek to harass and persecute him if he returned there. He might as well have based persecution on the allegation that he had a personal enemy in that town. There was no indication that the public officials of Sassano would be unable to protect him from this element, or that his safety would be endangered if he returned to any place in Italy other than the Village of Sassano.

In some respects this claim is similar to that raised in *Lardas* v. *Holland*, 139 F. Supp. 514 (E. D. Pa.), affirmed, 235 F. 2d 955 (C. A. 3). In that case, the alien sought to avoid deportation to Greece under Section 4 of the Displaced Persons Act of 1948, 62 Stat. 1009, as amended—which afforded relief on

grounds similar to those under 243 (h)—claiming that he feared persecution from Communist elements in his native village on an island off the coast of Greece. In upholding the administrative finding denying Section 4 relief, the Court of Appeals pointed out (235 F. 2d at 957):

> Judicial notice may and should be taken that political circumstances in Greece have changed greatly since 1949 and 1950. Certainly they are far from anarchic. In 1955 and 1956 an organized and controlling government exists in Greece. It is not communist dominated and does not sanction communist violence against anti-communists. Another proper subject of judicial notice is that Greece is a considerable country of some eight million inhabitants, while Andros is a very small off-shore island with only one substantial settlement of some three thousand inhabitants.
>
> In these circumstances petitioner's minimal showing of reason to fear return to the little island of Andros in 1949 or 1950 affords no reasonable basis for asserted fear to return to the country of Greece in 1955.[4] * * *

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[4] *D'Antonio* v. *Shaughnessy*, 139 F. Supp. 719 (S. D. N. Y.), held that an alien seeking adjustment of status under Section 6 of the Refugee Relief Act of 1953, 67 Stat. 400, as amended, 68 Stat. 1044, should be afforded the opportunity of submitting to the administrative authorities evidence in support of his claim even if such evidence be that he fears persecution other than from the *de facto* or *de jure* government. In the instant case petitioner was afforded full opportunity to submit such evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 832

UNITED STATES OF AMERICA, ex rel. ANGELO ANTONIO CANTISANI, *Petitioner*,

v.

R. J. HOLTEN, District Distributor of Immigration and Naturalization Service, Chicago, Illinois, *Respondent*.

PETITION FOR RE-HEARING PURSUANT TO THE PROVISIONS OF SECTION 58 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR RE-HEARING PURSUANT TO THE PROVISIONS OF SECTION 58 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

This is a petition by Angelo Antonio Cantisani for a re-hearing of the denial of certiorari by the Supreme Court of the United States pursuant to Section 58 sub-paragraph to the revised rules of the said Court. The petitioner respectfully shows this honorable Court as follows:

The Court erred in denying certiorari to the petitioner by overlooking that the petitioner was denied

"due process" for the reason that the District Director of Immigration and Naturalization Service in Chicago, Illinois, did deprive the petitioner of the proper application of the normal administrative procedures usually applied to aliens illegally in the United States. The intent of Congress was, when it vested the Attorney General with the authority and discretion, that it was to be utilized and applied within the meaning of **"due process"**.

CIRCUMSTANCES OF SUBSTANTIAL AND BINDING EFFECT

This petition is confined and limited by Section 58, Sub-Division 2 of the Revised Rules of the Supreme Court of the United States. The petitioner is now statutorily eligible in accordance with Title 8, Section 1254 of the United States code, to apply for Suspension of Deportation. He has resided in the United States continuously since February 19, 1949, and is a person of good moral character. The petitioner is not one of a class specifically excluded from discretionary relief. (Section 244.11 The Code of Federal Regulations).

Petitioner meets with all of the requirements to apply for suspension of deportation provided that the Attorney General exercises normal discretion and is not arbitrary or capricious in his judicious handling of this particular alien.

The record indicates that the petitioner has heretofore been denied **"due process"** in that he has prior to this petition, applied for discretionary relief on the ground that his return to his native land would ultimately result in his **DEATH OR PHYSICAL INJURY**, as is attested to by the exhibits attached to the peti-

tioner's appendix heretofore filed with this Honorable Court.

Furthermore the record reflects that the petitioner has approximately exhausted all his remedies administratively, however, since he is now eligible for relief under Title 8, Section 1254, he has never had an application or hearing for such relief. Petitioner believing that compliance and documentary evidence which has been submitted for relief under Title 8, Section 1253h, would have been afforded relief thereof.

It can readily be seen from the record in the courts below that this petitioner was denied arbitrarily the relief he sought under Title 8, Section 1253h, how then can we expect to obtain relief under Title 8, Section 1254, where again discretion lies with the Attorney General or those vested with his authority to grant relief.

Under those circumstances this Court in its exercise of judicious discretion must of necessity overrule the law applicable to the facts in this case and grant certiorari.

CONCLUSION

WHEREFORE this petition for re-hearing should be granted.

Respectfully submitted,

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Of Counsel

Certificate of Counsel

I, John J. O'Brien, counsel for the petitioner in the above-entitled cause, do certify that the Petition for Rehearing filed in this cause is presented in good faith and not for delay and is restricted to paragraph 2 of Section 58 of the revised rules of the Supreme Court of the United States.

JOHN J. O'BRIEN
Counsel for Petitioner